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In The

Supreme Court of the United States

OCTOBER TERM 1970

No. ~~1805~~, 70-261

JOSEPH P. SCOTT,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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(4485) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850
New York, N.Y. (212) 565-6377
Philadelphia, Pa. (215) 563-5587

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We submit the following reply to the brief submitted by the State of New York. The Attorney General of the State of New York has raised several points in his answering brief. We will deal with these points seriatim.

Reply Brief

I.

On Page 2 of the Attorney General's brief, in discussing the transfer of petitioner, Joseph P. Scott, from the New York State Vocational Institution to Matteawan State Hospital, the Attorney General states, "The transfer was made under order of Judge PAUL FROMER, Greene County Judge, which order was on notice to petitioner and made after a psychiatric examination showed that he was mentally ill."

We have shown in our original petition the futility of the notice given petitioner. Although he was purportedly served with notice, his jailers kept him locked up in a cell and prevented him from appearing before Judge Fromer to oppose the application then being made to transfer him. Furthermore, no attorney, guardian or other person was appointed to protect his interests on that application. Under these circumstances we can perceive of no constitutional basis that the notice referred to in the Attorney General's brief can serve.

What is more, by keeping petitioner locked up in his jail cell he was unable to cross examine the doctors who claimed he was ill.

II.

Scott was retained beyond his maximum prison term for more than sixteen years under a statute which is now conceded to be unconstitutional. The State of New York has been unable to locate

any decision upholding the validity of that statute although it is claimed by the State that the predecessors to that section have been on the statute books of the State since 1893.[1]

The Negro case, cited on page 3 of the State's answering brief is not in point.

The discussion of Section 409 of New York's Correction Law in Negro was pure dictum. In that case the court was not concerned with the validity of Section 409 and contrary to the assertion of the Attorney General, Negro, did not involve the validity of Section 409 either directly or by inference.

III.

It is argued by the Attorney General on Page 6 of his brief that "Constitutional rights are not involved in determining retrospective or prospective application of a judicial decision."

We submit that this argument is so specious as to be hardly worthy of rebuttal. Obviously if the judicial decision sought to be applied involved constitutional rights, then retrospective or prospective application of that decision will of necessity involve constitutional rights.

This Court has recognized that constitutional rights are involved in determining whether retro-

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1. Affirmation of Kent L. Mardon, Assistant Attorney General submitted in support of State's motion to dismiss the claim herein.

spective application be granted to decisions involving the Constitution on many occasions. Linkletter and Johnson are but two examples. What is more the Court of Appeals of New York has expressly held that there was a constitutional issue when it accepted jurisdiction to decide the appeal taken to it by petitioner herein.

IV.

It should be noted that the case of Parden, et al. v. Terminal Railway of the Alabama State Docks Department, cited on page 8 of the State's brief is wholly inapplicable.

We agree that there is nothing in the Constitution which requires the states to consent to be sued and to waive their sovereign immunity. On the other hand it is equally clear that the State of New York has waived its sovereign immunity in this case. Section 8 of New York State's Court of Claims Act provides, inter alia: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article." Therefore this case is wholly inapplicable.

Conclusion

For the foregoing reasons and for the reasons stated in the original petition we respectfully request this Court to grant certiorari and reverse the determination of New York's Court of Appeals.

Respectfully submitted,

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